

Construction Law

by **Frank O. Brown, Jr.***

I. INTRODUCTION

This Article focuses on noteworthy construction law decisions by appellate and federal district courts in Georgia between June 1, 2009 and May 31, 2010.¹

II. NEGLIGENT CONSTRUCTION

In *Cendant Mobility Financial Corp. v. Asuamah*,² Cendant Mobility Financial Corp. (Cendant) managed employee relocation benefits, including the sales of homes of relocated employees. Ms. Asuamah purchased a townhome from Cendant. After discovering water-related problems, she sued Cendant and others, asserting various claims.³ Among these claims was that prior to her purchase, “Cendant negligently repaired the townhome by accepting the [negligent] work done by an independent contractor.”⁴ The trial court granted summary judgment to Cendant on all claims.⁵ The Georgia Court of Appeals affirmed except as to the negligent repair claim against Cendant.⁶

The Georgia Supreme Court then granted Cendant’s petition for writ of certiorari.⁷ In its opinion, the supreme court stated that it had

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1. For an analysis of Georgia construction law during the prior survey period, see Frank O. Brown Jr., *Construction Law, Annual Survey of Georgia Law*, 61 MERCER L. REV. 65 (2009).

2. 285 Ga. 818, 684 S.E.2d 617 (2009).

3. *Id.* at 819, 684 S.E.2d at 618.

4. *Id.*

5. *Id.* at 819, 684 S.E.2d at 618-19.

6. *Id.*

7. *Id.* at 818-19, 684 S.E.2d at 618-19.

granted the petition because it was “particularly concerned with the Court of Appeals’s extension of the *Worthey* [v. Holmes] exception to caveat emptor to hold a non-builder/seller liable in negligence for latent construction/repair defects.”⁸ In reversing the court of appeals on the negligent construction claim, the supreme court stated in unusually clear, strong, and broad language, that

[t]o dispel any doubt, we hold that the “negligent construction” exception to caveat emptor exempts from the defense of caveat emptor only a negligence claim by a homeowner seeking recovery against the builder/seller of the home for latent building construction defects about which the purchaser/homeowner did not know and in the exercise of ordinary care would not have discovered, which defects either were known to the builder/seller or in the exercise of ordinary care would have been discovered by the builder/seller. Inasmuch as Cendant is not a builder/seller of the dwelling purchased by Asuamah, the trial court did not err when it granted summary judgment to Cendant.⁹

Given the breadth of this language, negligent construction claims against other non-builder/sellers, such as developers of condominiums constructed by independent contractors, appear to be barred.

III. GEORGIA’S CONSTRUCTION-RELATED STATUTE OF REPOSE

A. *Rosenberg v. Falling Water, Inc.*

In *Rosenberg v. Falling Water, Inc.*,¹⁰ a deck on a home collapsed eleven years after a certificate of occupancy for the home was issued and the home was sold to its first buyers. A year later, the third buyer of the home sued the original builder of the home and deck for personal injuries resulting from the collapse. The plaintiff alleged that the deck had been negligently constructed.¹¹ Pursuant to section 9-3-51 of the Official Code of Georgia Annotated (O.C.G.A.),¹² the builder asserted that the claims were barred by the eight- to ten-year construction-related statute of repose.¹³ In response, the plaintiff argued that the builder

8. *Id.* at 819, 684 S.E.2d at 619 (citing *Worthey v. Holmes*, 249 Ga. 104, 287 S.E.2d 9 (1982)).

9. *Id.* at 822, 684 S.E.2d at 620-21 (citation omitted).

10. 302 Ga. App. 78, 690 S.E.2d 183 (2009).

11. *Id.* at 78-79, 690 S.E.2d at 184.

12. O.C.G.A. § 9-3-51 (2007).

13. *Rosenberg*, 302 Ga. App. at 79 & n.2, 690 S.E.2d at 184 & n.2. Pursuant to O.C.G.A. § 9-3-51,

(a) No action to recover damages:

was equitably estopped from asserting the statute of repose because the builder had fraudulently concealed the negligent construction by using bolts that made the deck appear to be properly attached to the house.¹⁴

The Georgia Court of Appeals affirmed the trial court's grant of summary judgment to the builder based on the statute of repose.¹⁵ In explaining its decision, the court first stated that a statute of repose, unlike a statute of limitation, cannot be "tolled" by fraud.¹⁶ The court noted, however, that a defendant may be equitably estopped from asserting the statute of repose if (a) "the plaintiff's injury occurred *before the statute of repose period expired*," (b) "the defendant's fraud occurred *after the injury*," and (c) the "fraud delayed or prevented the plaintiff from filing suit until after the statute of repose period had expired."¹⁷ Because the plaintiff's injuries occurred after the statute of repose had expired, the court reasoned that equitable estoppel did not apply.¹⁸

(1) For any deficiency in the survey or plat, planning, design, specifications, supervision or observation of construction, or construction of an improvement to real property;

(2) For injury to property, real or personal, arising out of any such deficiency; or

(3) For injury to the person or for wrongful death arising out of any such deficiency

shall be brought against any person performing or furnishing the survey or plat, design, planning, supervision or observation of construction, or construction of such an improvement more than eight years after substantial completion of such an improvement.

(b) Notwithstanding subsection (a) of this Code section, in the case of such an injury to property or the person or such an injury causing wrongful death, which injury occurred during the seventh or eighth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within two years after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than ten years after the substantial completion of construction of such an improvement.

14. *Rosenberg*, 302 Ga. App. at 79-80, 690 S.E.2d at 184-85. The plaintiff did not assert a cause of action for fraudulent concealment, but he argued that the alleged fraudulent concealment estopped the builder from relying on the statute of repose. *Id.* at 80 & n.4, 690 S.E.2d at 185 & n.4.

15. *Id.* at 81-82, 690 S.E.2d at 186.

16. *Id.* at 80, 690 S.E.2d at 185 (internal quotation marks omitted). Pursuant to O.C.G.A. § 9-3-96 (2007), which applies to statutes of limitation, "[i]f the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud."

17. *Rosenberg*, 302 Ga. App. at 81, 690 S.E.2d at 186.

18. *See id.* at 81-82, 690 S.E.2d at 186.

B. Facility Construction Management, Inc. v. Ahrens Concrete Floors, Inc.

In *Facility Construction Management, Inc. v. Ahrens Concrete Floors, Inc.*,¹⁹ Facility Construction Management, Inc. (Facility), a general contractor, contracted to construct a project in Pennsylvania. Facility retained Ahrens Concrete Floors, Inc. (Ahrens) to construct the project's concrete floor. The subcontract between the parties required Ahrens to indemnify Facility against claims arising from Ahrens's work and further required Ahrens to obtain insurance to cover its work and its indemnification obligation. Ahrens did obtain insurance, which named Facility as an additional insured. Ahrens substantially completed the floor in September 1999. In August 2002, the project's owner sued Facility for damages in Pennsylvania state court, alleging defective construction of the floor.²⁰

Facility called upon Regent Insurance Company (Regent), the insurer from which Ahrens had obtained insurance, to defend the project owner's claim. Regent denied coverage and filed a declaratory judgment action against Facility in Iowa.²¹ Facility sued Ahrens in the Superior Court of Cobb County, Georgia in March 2008, while both the owner's Pennsylvania suit against Facility and Regent's Iowa declaratory judgment action were still pending.²² Facility alleged, *inter alia*, that Ahrens had breached its contractual obligation to indemnify and to obtain insurance and that Ahrens negligently represented that it had obtained insurance in compliance with its subcontract.²³ Facility sought damages and a declaratory judgment relating to Ahrens's obligations to defend and indemnify.²⁴

Ahrens filed a motion for summary judgment, which focused on its defense that all of Facility's claims were barred by Georgia's construction-related statute of repose at O.C.G.A. § 9-3-51.²⁵ Facility argued that Pennsylvania's twelve-year statute of repose governed rather than Georgia's eight- to ten-year statute of repose.²⁶ The United States District Court for the Northern District of Georgia rejected that

19. No. 1:08-cv-01600-JOF, 2010 WL 1265184 (N.D. Ga. Mar. 24, 2010).

20. *Id.* at *1-2.

21. *Id.* at *2.

22. *Id.* at *1, *2. The defendant later removed the action to the United States District Court for the Northern District of Georgia based on diversity jurisdiction. *Id.* at *1.

23. *Id.* at *2-3.

24. *Id.* at *1.

25. *Id.* at *2, *4.

26. *Id.* at *4.

argument, reasoning that while Pennsylvania law governed the substantive issues between the parties, Georgia law governed procedural matters, which include statutes of repose.²⁷ The court then noted that because the flooring project was completed in September 1999 and because the subject suit was not filed until March 2008, any of Facility's claims covered by the terms of Georgia's statute of repose would be barred.²⁸

Facility contended that its claims for indemnification and for breach of duty to maintain insurance were not covered by the statute of repose because they were not claims for deficient construction, the type of claims addressed in the statute.²⁹ The court rejected that argument, stating that although Facility's claims were "couched in terms of indemnification and defense, [Facility was] required to prove [that Ahrens] deficiently constructed, planned, or designed the concrete slab" to prevail against Ahrens.³⁰ In essence, the court reasoned that Facility was "attempting to recover for losses . . . or injury to property caused by deficient construction."³¹ Because Georgia's statute of repose covered Facility's damages claims, the court granted Ahrens's motion for summary judgment.³²

IV. STATUTES OF LIMITATION

In *Jordan Jones & Goulding, Inc. v. Newell Recycling of Atlanta, Inc.*,³³ Newell Recycling of Atlanta, Inc. (Newell) was a scrap metal recycler. Jordan Jones and Goulding, Inc. (JJ&G) was an engineering firm. JJ&G designed a concrete pad for Newell and completed its engineering work related to the pad by 1999. In 2004 Newell sued JJ&G, alleging that the concrete pad was cracking as a result of JJ&G's design errors.³⁴ JJ&G moved for summary judgment, asserting that pursuant to O.C.G.A. § 9-3-25³⁵ Newell's claims were barred by the four-year statute of limitation.³⁶ Newell responded that its claims were

27. *Id.* at *3-5.

28. *Id.* at *6.

29. *Id.* at *4; *see* O.C.G.A. § 9-3-51.

30. *Facility Onstr. Mgmt.*, 2010 WL 1265184 at *8.

31. *Id.*

32. *Id.* at *10.

33. 299 Ga. App. 294, 682 S.E.2d 666 (2009).

34. *Id.* at 294-96, 682 S.E.2d at 667-68.

35. O.C.G.A. § 9-3-25 (2007).

36. *See Newell Recycling*, 299 Ga. App. at 296, 682 S.E.2d at 668. A four-year limitations period applies to "[a]ll actions . . . for the breach of any contract not under the hand of the party sought to be charged, or upon any implied promise or undertaking . . ." O.C.G.A. § 9-3-25.

governed by the six-year statute of limitation in O.C.G.A. § 9-3-24,³⁷ which addresses claims for breach of written contracts.³⁸ The trial court denied JJ&G's motion, finding there was an issue of fact concerning whether the draft scope and letters between the parties constituted a written contract and determining that O.C.G.A. § 9-3-24 would only apply to Newell's claims if they were based on a written contract. The trial court granted JJ&G's certificate of immediate review.³⁹ Thereafter, the Georgia Court of Appeals granted JJ&G's application for interlocutory appeal.⁴⁰

The court of appeals reversed the trial court,⁴¹ holding that even if the letters and draft scope constituted a written contract, Newell's claims were still subject to the four-year statute of limitation in O.C.G.A. § 9-3-25.⁴² According to the court, § 9-3-25 applied because Newell asserted professional malpractice claims that were not based on an express contract provision that required JJ&G to perform its work in conformity with professional engineering standards.⁴³ Rather, Newell based its claims on an implied contractual obligation for JJ&G to perform its work.⁴⁴

V. ASSIGNMENT OF CLAIMS

Settlements of construction claims often involve the assignment of rights by a defendant to the plaintiff. In *Seaboard Construction Co. v. Weitz Co.*,⁴⁵ the United States District Court for the Southern District of Georgia addressed two issues relevant to such assignments. Coastal Community Retirement Corp. hired the Weitz Company, LLC (Weitz) as the general contractor to build a retirement project. Weitz subcontracted with Southeast Land Developers, Inc., which in turn subcontracted with Seaboard Construction Company to pave some project roads. Seaboard thereafter filed suit against Southeast and obtained a judgment. Southeast then assigned to Seaboard its right to payment pursuant to its contract with Weitz. Seaboard filed this action as an assignee of

37. O.C.G.A. § 9-3-24 (2007).

38. *Newell Recycling*, 299 Ga. App. at 298, 682 S.E.2d at 670; see O.C.G.A. § 9-3-24.

39. *Newell Recycling*, 299 Ga. App. at 297, 682 S.E.2d at 669.

40. *Id.*

41. *Id.* at 299-300, 682 S.E.2d at 671.

42. *Id.* at 297-98, 682 S.E.2d at 669 (quoting *Harrison v. Beckham*, 238 Ga. App. 199, 200 n.2., 518 S.E.2d 435, 436 n.2 (1999)).

43. *Id.* at 298-99, 682 S.E.2d at 670.

44. *Id.* at 299, 682 S.E.2d at 670.

45. No. CV208-105, 2009 WL 3855185 (S.D. Ga. Nov. 17, 2009).

Southeast asserting Southeast's right to payment under its subcontract with Weitz.⁴⁶

Weitz filed a motion for summary judgment in which it made two arguments relating to the assignment of claims. First, Weitz argued that the assignment of Southeast's rights to Seaboard was unenforceable because it was only a partial assignment.⁴⁷ The district court acknowledged that, absent the consent of the debtor, partial assignments are unenforceable because they potentially expose debtors to multiple suits on the same underlying obligation.⁴⁸ The court also recognized that the assignment from Southeast to Seaboard limited the amount Seaboard could collect from Weitz to the amount Southeast owed to Seaboard.⁴⁹ However, because Southeast did not have any rights against Weitz, the court reasoned that the assignment was full, not partial.⁵⁰

Second, Weitz argued that the assignment was invalid because Weitz's subcontract with Southeast forbade assignments without Weitz's consent.⁵¹ The court rejected that argument on the basis that "under Georgia law, once a party to a contract performs its obligations under a contract" so that the contract is no longer executory, that party may assign its right to payment under the contract "without the other party's consent," even if the contract contains an anti-assignment clause.⁵²

VI. DAMAGES LIMITATIONS

In *RSN Properties, Inc. v. Engineering Consulting Services, Ltd.*,⁵³ RSN Properties, Inc. (RSN), a residential developer, retained Engineering Consulting Services, Ltd. (Engineering Consulting) to perform soil studies and to advise it on whether it should use septic systems in a residential subdivision.⁵⁴ Engineering Consulting received \$2200 for its work.⁵⁵ RSN thereafter sued Engineering Consulting for negligence and breach of contract, alleging that Engineering Consulting erroneously determined that most of the lots were suitable for septic systems. RSN sought damages in excess of \$100,000. Engineering Consulting filed a motion for partial summary judgment, relying on a provision in the

46. *Id.* at *1.

47. *Id.* at *2.

48. *Id.* at *3.

49. *Id.* at *2.

50. *Id.* at *3.

51. *Id.* at *2, *4.

52. *Id.* at *5.

53. 301 Ga. App. 52, 686 S.E.2d 853 (2009).

54. *Id.* at 52, 686 S.E.2d at 854.

55. *Id.* at 54, 686 S.E.2d at 855.

parties' contract that limited Engineering Consulting's liability to no more than \$50,000 or the value of its services to RSN. RSN responded by arguing that the damages limitation was void because it violated public policy. The trial court granted Engineering Consulting's motion, and RSN appealed.⁵⁶

The Georgia Court of Appeals affirmed the trial court's decision.⁵⁷ In doing so, the court emphasized that its opinion was based on the particular facts before it: the parties contracted in a commercial setting and were in relatively equal bargaining positions; the fee was small relative to the potential damages resulting from the engineer's alleged error; and the damages limitation was large enough that the engineer retained the incentive to properly perform its engineering work.⁵⁸ The court also noted that the damages limitation provision did not implicate O.C.G.A. § 13-8-2⁵⁹ because it was not a release that held Engineering Consulting harmless for its engineering errors.⁶⁰

VII. THE MILLER ACTS

*United States for the Use & Benefit of WFI Georgia, Inc. v. Gray Insurance Co.*⁶¹ is a federal Miller Act⁶² case, which involves a convoluted set of facts and parties and no binding precedent from the United

56. *Id.* at 52-53, 686 S.E.2d at 854.

57. *Id.* at 55, 686 S.E.2d at 855.

58. *Id.* at 54, 686 S.E.2d at 855.

59. O.C.G.A. § 13-8-2(b) (2008). Pursuant to O.C.G.A. § 13-8-2(b)

[a] covenant, promise, agreement, or understanding in or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair, or maintenance of a building structure, appurtenances, and appliances, including moving, demolition, and excavating connected therewith, purporting to require that one party to such contract or agreement shall indemnify, hold harmless, insure, or defend the other party to the contract or other named indemnitee, including its, his, or her officers, agents, or employees, against liability or claims for damages, losses, or expenses, including attorney fees, arising out of bodily injury to persons, death, or damage to property caused by or resulting from the sole negligence of the indemnitee, or its, his, or her officers, agents, or employees, is against public policy and void and unenforceable. This subsection shall not affect any obligation under workers' compensation or coverage or insurance specifically relating to workers' compensation, nor shall this subsection apply to any requirement that one party to the contract purchase a project specific insurance policy, including an owner's or contractor's protective insurance, builder's risk insurance, installation coverage, project management protective liability insurance, an owner controlled insurance policy, or a contractor controlled insurance policy.

60. *RSN Properties*, 301 Ga. App. at 54-55, 686 S.E.2d at 855.

61. 701 F. Supp. 2d 1320 (N.D. Ga. 2010).

62. 40 U.S.C. §§ 3131-3134 (2006).

States Court of Appeals for the Eleventh Circuit.⁶³ In *Gray Insurance*, the United States District Court for the Northern District of Georgia held that the surety was bound by the arbitration award against its principal because the surety, which did not participate in the arbitration, had both notice of the arbitration and an opportunity to defend its principal.⁶⁴

In *Western Surety Co. v. APAC-Southeast, Inc.*,⁶⁵ APAC-Southeast, Inc. (APAC) subcontracted with Bruce Albea Contracting, Inc. (Albea) to provide asphalt for a Georgia Department of Transportation road project. The subcontract prohibited APAC from assigning it. APAC provided asphalt for part of the project and then assigned the subcontract to C.W. Matthews Contracting Company, Inc. (C.W. Matthews) as part of an assignment and sale of most of APAC's assets to C.W. Matthews. At the time of the assignment, Albea owed APAC \$1,202,745.98. After the assignment, APAC filed suit against Albea for breach of contract and against Albea's surety, Western Surety Company and Continental Casualty Company (collectively "Western Surety"), for payment under a payment bond. The trial court granted APAC's motion for summary judgment against Albea and Western Surety, and the defendants appealed.⁶⁶

The defendants argued that the trial court erred when it granted summary judgment to APAC because APAC's breach of the anti-assignment provision of its subcontract negated its claim against both Albea and its sureties.⁶⁷ The Georgia Court of Appeals agreed with the defendants that APAC could not pursue a breach of contract claim given that APAC assigned the subcontract in violation of the anti-assignment provision.⁶⁸ However, the court held that APAC could recover on the payment bond despite the anti-assignment provision.⁶⁹ In reaching that conclusion, the court noted that Georgia's Little Miller Act⁷⁰ creates a cause of action for claims under public works contracts, and the statute should be liberally construed.⁷¹ The court also noted that the subject payment bond was "unambiguous as to the sureties' responsibili-

63. See *Gray Insurance*, 701 F. Supp. 2d at 1323, 1327.

64. *Id.* at 1326, 1328-29.

65. 302 Ga. App. 654, 691 S.E.2d 234 (2010).

66. *Id.* at 654-55, 691 S.E.2d at 236-37.

67. *Id.* at 654, 691 S.E.2d at 236.

68. *Id.* at 655-57, 691 S.E.2d at 237-38.

69. *Id.* at 657, 691 S.E.2d at 238.

70. Ga. H.R. Bill 513, Reg. Sess., 2001 Ga. Laws 820 (codified in scattered sections of the O.C.G.A.).

71. *Western Surety*, 302 Ga. App. at 657-58, 691 S.E.2d at 238; see O.C.G.A. § 13-10-63 (2010).

ty for paying anyone providing labor or materials to the project.”⁷² Finally, the court noted that Western Surety consented to delegating APAC’s duties to C.W. Matthews, the assignee, under the subcontract when Western Surety negotiated a new contract with C.W. Matthews and payed it substantial sums for providing asphalt.⁷³ For these reasons, the court of appeals affirmed the trial court’s grant of summary judgment against Western Surety and Albea (as principal under the payment bond) on APAC’s bond claim.⁷⁴

VIII. WARRANTIES

In *Georgia State Financing & Investment Commission v. XL Specialty Insurance Co.*,⁷⁵ Georgia State Financing & Investment Commission (GSFIC) entered into a contract with a general contractor for the construction of buildings for a state hospital. After a final inspection required by the contract, the general contractor had XL Specialty Insurance Company (XL) issue a roof bond in favor of GSFIC.⁷⁶ The bond warranted that the roof would be watertight “for a period of five years from the date of the execution of the final certificate of the architect.”⁷⁷ The architect, however, expressly refused to issue a final certificate of completion because the work had not been completed. Four years after the bond was issued, GSFIC sued XL and others on the bond, alleging roof leaks. The trial court granted summary judgment to XL, and GSFIC appealed.⁷⁸ The issue on appeal was whether the bond applied because the architect had never executed the final certificate.⁷⁹ The Georgia Court of Appeals reasoned that the bond clearly covered only roof and wall issues within five years after the architect executed the final certificate, and because the certificate was never executed, the bond was not triggered.⁸⁰ Thus, the court affirmed the trial court’s grant of summary judgment in favor of XL.⁸¹

72. *Western Surety*, 302 Ga. App. at 658, 691 S.E.2d at 239 (emphasis omitted).

73. *Id.*

74. *Id.* at 658-59, 691 S.E.2d at 239.

75. 303 Ga. App. 540, 694 S.E.2d 193 (2010).

76. *Id.* at 540-41, 694 S.E.2d at 194.

77. *Id.* at 541, 694 S.E.2d at 194 (internal quotation marks omitted).

78. *Id.*

79. *Id.* at 542-43, 694 S.E.2d at 195-96.

80. *Id.* at 543, 694 S.E.2d at 196.

81. *Id.*

IX. ARBITRATION

A. *International Fidelity Insurance Co. v. BMC Contractors, Inc.*

In *International Fidelity Insurance Co. v. BMC Contractors, Inc.*,⁸² a federal court action, International Fidelity Insurance Co. (IFIC) sued a number of defendants, including Star Building Systems (Star) and BMC Contractors, Inc. (BMC) for negligence and breach of contract. Star filed a cross-claim against BMC. When BMC failed to timely answer the claim, Star obtained a default judgment against BMC. Almost two weeks later, BMC filed a response to the cross-claim along with a motion to set aside the default judgment.⁸³

About five months later, while that motion was still pending, BMC moved the United States District Court for the Middle District of Georgia to stay the suit and to compel arbitration under an arbitration provision in the contract between Star and BMC.⁸⁴ Finding good cause under Federal Rule of Civil Procedure 55,⁸⁵ the court set aside the default.⁸⁶ In doing so, the court characterized the good cause standard as “mutable.”⁸⁷ In a second blow to Star, the court then determined that BMC had not waived its right to demand and compel arbitration, even though BMC waited five months after filing its motion to set aside Star’s default judgment before filing its motion to compel arbitration.⁸⁸

B. *LandSouth Construction, LLC v. Lake Shadow Ltd.*

In *LandSouth Construction, LLC v. Lake Shadow Ltd.*,⁸⁹ Lake Shadow Limited, LLC (Lake Shadow) hired LandSouth Construction, LLC (LandSouth) to build a condominium project. After the project was completed, a dispute arose about the amount of money Lake Shadow owed to LandSouth. LandSouth filed a mechanic’s lien on the project and followed with a suit against Lake Shadow to perfect and foreclose on the lien. LandSouth asserted breach of contract, quantum meruit, and unjust enrichment but did not invoke the arbitration provision in

82. No. 5:06-cv-186 (CAR), 2009 WL 2143820 (M.D. Ga. July 14, 2009).

83. *Id.* at *1-2.

84. *Id.* at *2.

85. FED. R. CIV. P. 55.

86. *Int’l Fid. Ins.*, 2009 WL 2143820, at *2.

87. *Id.* (quoting *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996)) (internal quotation marks omitted).

88. *Id.* at *3.

89. 303 Ga. App. 413, 693 S.E.2d 608 (2010).

the parties' contract. Before Lake Shadow responded and before the parties engaged in significant discovery, the parties settled that suit, and LandSouth filed a dismissal.⁹⁰

Seven months later, Lake Shadow filed a damages suit against LandSouth for negligent construction and breaches of contract and warranty. LandSouth responded and moved to compel arbitration. The trial court denied the motion to compel, finding that LandSouth had waived its right to insist on arbitration when it did not raise the arbitration provision in the prior litigation. Significantly, the trial court stated that had LandSouth's complaint in the prior suit only sought to perfect and foreclose on its liens instead of also including claims for damages, no waiver would have occurred because the law required LandSouth to perfect and foreclose its lien in court rather than allow it to pursue those remedies in arbitration.⁹¹ The trial court issued a certificate of immediate review, and the Georgia Court of Appeals granted LandSouth's application for interlocutory appeal.⁹²

In its opinion, the court of appeals first noted that the Georgia Supreme Court issued a policy statement in *Phillips Construction Co. v. Cowart Iron Works, Inc.*⁹³ in favor of granting interlocutory appeals of a trial judge's decision to stay judicial proceedings pending arbitration.⁹⁴ Reversing the trial court, the court of appeals held that LandSouth had not waived its right to arbitrate by filing the first action because it was required to file that action to perfect and foreclose on its lien.⁹⁵ The court also determined that Lake Shadow had not shown prejudice from the filing of the first action because that action had quickly settled.⁹⁶ Finally, the court cited a general non-waiver provision in the parties' contract that incorporated general conditions set forth by the American Institute of Architects.⁹⁷

X. RIGHT TO TERMINATE CONTRACTS

In *Forsyth County v. Waterscape Services, LLC*,⁹⁸ Forsyth County, Georgia (Forsyth), and Waterscape Services, LLC (Waterscape) entered

90. *Id.* at 413-14, 693 S.E.2d at 608-09. The terms of the settlement are not included in the opinion. See *LandSouth Constr.*, 303 Ga. App. 413, 693 S.E.2d 608.

91. *Id.* at 414, 693 S.E.2d at 609.

92. *Id.*

93. 250 Ga. 488, 299 S.E.2d 538 (1983).

94. *LandSouth Constr.*, 303 Ga. App. at 414 n.2, 693 S.E.2d at 609 n.2 (quoting *Phillips Constr.*, 250 Ga. at 489, 299 S.E.2d at 539).

95. *Id.* at 415-16, 693 S.E.2d at 610.

96. *Id.* at 415, 693 S.E.2d at 610.

97. *Id.* at 415-16, 693 S.E.2d at 610.

98. 303 Ga. App. 623, 694 S.E.2d 102 (2010).

into a contract for Waterscape to design and construct a water treatment plant and then convey it to Forsyth.⁹⁹ After the project was complete, Waterscape notified Forsyth that it was terminating the contract because of a change order dispute between the parties and that it would not convey the plant to Forsyth.¹⁰⁰ Forsyth sued for specific performance and damages for breach of contract. Waterscape counterclaimed for a declaratory judgment that it had properly terminated the contract and for other relief. The trial court denied Forsyth's motion for summary judgment but granted summary judgment on Waterscape's counterclaims.¹⁰¹

On appeal, one key issue was whether Waterscape had waived its right to terminate the contract.¹⁰² The court of appeals held that Waterscape waived its right to terminate under a specific provision of the contract because that provision only applied prior to commencing the project.¹⁰³ The court stated that because Waterscape had proceeded with the project, it waived termination rights under that provision.¹⁰⁴

The other key issue on appeal was whether Forsyth's alleged failure to pay for the change order allowed Waterscape to terminate the contract.¹⁰⁵ The court stated that for a party to have the right to terminate a contract rather than merely seek damages for a breach, the breach must be material, which the court defined as "so substantial and fundamental as to defeat the object of the contract."¹⁰⁶ Because the change order dispute involved only about two percent of the total compensation to Waterscape under the contract and the dispute did not prevent Waterscape from completing the project, the court reasoned that the alleged breach was not material and Waterscape could not terminate the contract.¹⁰⁷ Thus, the court of appeals reversed the trial court's denial of Forsyth's motion for summary judgment and its grant of summary judgment to Waterscape.¹⁰⁸

99. *Id.* at 623-24, 694 S.E.2d at 105-06.

100. *Id.* at 623, 694 S.E.2d at 105.

101. *Id.*

102. *See id.* at 629, 694 S.E.2d at 109.

103. *Id.* at 630-31, 694 S.E.2d at 109-10.

104. *Id.* at 632, 694 S.E.2d at 111.

105. *See id.*

106. *Id.* at 633, 694 S.E.2d at 111 (quoting *Lanier Home Ctr., Inc. v. Underwood*, 252 Ga. App. 745, 746, 557 S.E.2d 76, 79 (2001)) (internal quotation marks omitted).

107. *Id.* at 633-34, 694 S.E.2d at 112.

108. *Id.* at 634, 694 S.E.2d at 112.

XI. ECONOMIC LOSS RULE

Although not a construction case, *ASC Construction Equipment USA, Inc. v. City Commercial Real Estate, Inc.*¹⁰⁹ provides a reminder of an exception to the economic loss rule,¹¹⁰ frequently invoked in the context of construction disputes.¹¹¹ In *ASC Construction*, the court of appeals reiterated that under the economic loss rule, a contracting party generally must seek a remedy in contract—not in tort—when the party suffers purely economic losses.¹¹² According to the court, however, an exception applies in certain cases of fraudulent misrepresentation.¹¹³

XII. ACCEPTANCE DOCTRINE

In *Hollis & Spann, Inc. v. Hopkins*,¹¹⁴ the plaintiff sued Hollis & Spann, Inc. (Hollis), the contractor of a hotel handicap access ramp, for damages she suffered while trying to cross the ramp. Hollis filed a motion for summary judgment, arguing that the acceptance doctrine precluded the plaintiff's claims.¹¹⁵ The trial court denied Hollis's motion.¹¹⁶ Thereafter, the Georgia Court of Appeals granted Hollis's application for interlocutory appeal.¹¹⁷

The court described the acceptance doctrine as follows:

[W]here a contractor who does not hold itself out as an expert in the design work such as that involved in the controversy, performs its work without negligence, and the work is approved and accepted by the owner or the one who contracted for the work on the owner's behalf, the contractor is not liable for injuries resulting from the defective design of the work.¹¹⁸

Recognizing that several exceptions to the acceptance doctrine exist, however, the court of appeals affirmed the trial court's denial of

109. 303 Ga. App. 309, 693 S.E.2d 559 (2010).

110. *See id.* at 316, 693 S.E.2d at 566.

111. *See, e.g., J. Kinson Cook, Inc. v. Heery/Mitchell*, 284 Ga. App. 552, 644 S.E.2d 440 (2007); *Rowe v. Akin & Flanders, Inc.*, 240 Ga. App. 766, 525 S.E.2d 123 (1999).

112. *ASC Constr.*, 303 Ga. App. at 316, 693 S.E.2d at 566 (quoting *City of Cairo v. Hightower Consulting Eng'rs*, 278 Ga. App. 721, 728, 629 S.E.2d 518, 524-25 (2006)).

113. *Id.*

114. 301 Ga. App. 29, 686 S.E.2d 817 (2009).

115. *Id.* at 29, 686 S.E.2d at 818.

116. *Id.* at 30, 686 S.E.2d at 818.

117. *Id.*

118. *Id.* at 31, 686 S.E.2d at 819 (quoting *Bragg v. Oxford Constr. Co.*, 285 Ga. 98, 99 n.1, 674 S.E.2d 268, 269 n.1 (2009)).

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summary judgment for two reasons.¹¹⁹ First, there was an issue of fact as to whether Hollis had negligently constructed the ramp.¹²⁰ That issue existed even though the hotel and the municipal inspector had allegedly accepted the ramp because there was evidence that the ramp did not comply with the plans and applicable codes.¹²¹ Because of this issue of fact, the acceptance doctrine did not clearly apply.¹²²

Second, the court of appeals affirmed the trial court's denial of Hollis's motion for summary judgment because there was an issue of fact about whether the ramp was imminently dangerous.¹²³ If it was, then the exception to the acceptance doctrine for imminently dangerous work would apply.¹²⁴

119. *Id.* at 32-33, 686 S.E.2d at 819-20.

120. *Id.* at 32, 686 S.E.2d at 820.

121. *Id.* at 30, 32, 686 S.E.2d at 818, 820.

122. *Id.* at 33, 686 S.E.2d at 820.

123. *Id.*

124. *See id.* at 32, 686 S.E.2d at 819.